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IN THE

Supreme Court of the United States

October Term, 1961

No. 10

ALDEN WHITMAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of *Amicus*

The New York Civil Liberties Union, the New York affiliate of the American Civil Liberties Union, submits this brief with the consent of both parties, on file with the clerk of this Court.

The case at bar arises from petitioner's refusal in a hearing of a Congressional investigating committee, where he testified fully respecting his membership in the Communist Party some years before, to expose the identity of others he had known in the Communist Party and in other groups and organizations now in public disrepute. His refusal to answer the Committee's demand that he name his past associates was grounded in the belief that he and his acquaintances had engaged only in lawful expression on political, social and economic issues of the day, and that he knew no one who had been connected with subversive

activities or advocacy of revolution or violence. With no justification in terms of the national safety adduced for exposing his past associates to public embarrassment and hostility, petitioner was constrained by deep ethical beliefs from naming them only to exculpate himself before the committee—only to "save his own skin."

Recognizing that the vitality of a democracy rests on the individual citizen's sense of conscience and ethical responsibility, *amicus* is here concerned with the committee's order to petitioner to contravene his conscientious scruples. *Amicus* believes that this order, under the circumstances of this case, was an unjustified interference with the freedom of belief guaranteed by the First Amendment of the Constitution.

Basis of Petitioner's Conviction and Questions To Be Argued by *Amicus*

Petitioner was convicted on 19 counts of contempt, under 2 U. S. C. 192, for refusing to answer questions propounded in a hearing held on January 6, 1956 before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws, of the Senate Judiciary Committee.

Petitioner's position at the hearing was that he had not been apprised of the committee's purpose in subpoenaing him, and that he doubted the pertinence and constitutionality of the entire interrogation. Nevertheless, he stated he would answer all questions except those which were directed to exposing the identity of individuals with whom he had formerly associated. He was unwilling to subject them and their families to the injuries that result from such public denunciation and embarrassment.[1] Despite the in-

[1] Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, of the Committee on the Judiciary of the United States Senate, 84th Cong., 2nd Sess., Part 17, hereinafter termed Hearings, pp. 1733-4, 1737-8, 1740-2, and ff.

timation in the Government's memorandum in opposition to certiorari that the unanswered questions were not all demands for the names of other individuals, it is clear that petitioner's refusals to answer were based on the fact that he so understood them; and the committee, knowing his position as to the type of interrogation he was willing and unwilling to answer, did not apprise him that these questions had any purpose other than to focus on and expose individual men and women. In fact, the committee itself viewed the questions in the same light as did petitioner and regarded his contempt as a refusal to give names. For, the committee stated in its report that petitioner "challenged the jurisdiction of the subcommittee to require him to give the names of any persons who were members with him in the various units to which he belonged."[1] Accordingly, the committee's directions to petitioner to answer must be evaluated as efforts to publicly elicit names and personal identifications through compelled testimony.

Amicus will limit itself to three points in its argument against the validity of petitioner's conviction:

1. Petitioner's conviction violated the due process requirement that unless pertinency appears with indisputable clarity, the witness, upon his objection on grounds of pertinency, must be apprised of the pertinency of the question he is refusing to answer.

2. Petitioner's conviction was invalid under the contempt statute because the Government cannot establish the pertinence of the questions he refused to answer.

3. Petitioner's conviction violated the guarantees of the First Amendment to the Constitution of freedom of belief,

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[1] Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, to the Committee on the Judiciary, United States Senate, 84th Cong., 2nd Sess., for the Year 1956, Section VIII, p. 100. As to the committee's duty of explanation if the questions had any purport other than that assumed by petitioner, compare *Quinn* v. *United States*, 349 U. S. 155, 163-4.

expression, press, and association; and also violated the guarantee of the Fifth Amendment against arbitrary governmental action and unreasonable interferences with privacy.

Summary of Argument

I. Although the pertinence of the questions petitioner refused to answer was unclear, and although petitioner objected to them on this ground, the committee failed to clarify their pertinence. The first requisite for clarification of pertinence is clarification of the subject of the investigation. The subject of this investigation was neither indicated by statements of the committee or its counsel, by the questioning itself, nor by any other source of information. When petitioner suggested the possibility that the subject related to the press, the committee chairman and counsel indicated that this supposition was erroneous.

The range of questions asked petitioner as well as statements in the course of the interrogation, indicated that the committee's interest lay merely in a personal biographical investigation of petitioner due to his past Communist Party membership. This emphasis augmented the obscurity of the pertinence of the questions petitioner refused to answer, which were directed at eliciting the identity of other individuals formerly in the Communist Party and in various defunct groups or organizations.

II. Even if there had, contrary to fact, been a subject of investigation, the pertinence of the questions petitioner refused to answer, requiring him to expose individuals he had formerly known as Communists or members of other organizations, could not be established. The materiality in a grand jury investigation of questions forcing the witness to identify others, does not establish the pertinence of such questions in a Congressional investigation, because of the difference in function of the two bodies. In contrast with the grand jury's function of investigating and charg-

ing individuals, a congressional committee's justification for interrogating witnesses is to secure substantive information on specific subjects for legislative purposes. Names of private individuals do not, of themselves, contribute substantive information to aid in any legislative deliberation. The possibility that these names and identifications, if traced by the committee's staff, might produce witnesses who might have information to contribute in some yet undesignated investigation, is insufficient to render the questions pertinent. This conjectural future utility is far removed from the purpose, required for a conviction under the contempt statute, of gaining information from the witness on the stand pertaining to the subject of the then-current investigation.

When a witness is forced to name others in this type of investigation by a Congressional committee, the named individuals are pilloried without a hearing. On the basis of the witness' impressions and perhaps faulty memory of their past associations with unpopular groups, the names of absent men and women are publicized and held up to public obloquy, without their even having the degree of opportunity for explanation afforded to a witness on the stand.

III. In refusing to name his past associates, under the circumstances in which the committee made this demand, petitioner adhered to a conviction that reflected generally accepted ethical or religious tenets and the credo of a democrat. He was expressing the ethic that a man should not sacrifice other men for his selfish interest: that he should not level accusations against others merely to exculpate himself and unless the public necessity therefor was demonstrated. Petitioner's refusal to answer also reflected a dedication to democratic rights and to the ancient democratic tradition against denunciation of political heretics. For the committee was ordering petitioner to expose individuals to public hostility because, so far as he knew,

they had merely exercised the constitutional right of political dissent.

The demand of conscience upon any ethical individual in this situation to consider whether his accusations would serve the public interest or only self-interest, is intensified by the fact that it is not in keeping with our government's traditions to force private individuals to make public accusations against others. The traditional accusatory role of a private individual—before a grand jury—is far different from the role the committee attempted to impose on petitioner. The order here was for the witness to initiate damaging charges, publicly and with sole responsibility; he was to bear the burden of doing individuals and their families irreparable injury though no defined or established wrongs were under investigation. Indeed, the committee failed to clarify *any* justification from the standpoint of the public welfare for the damaging exposures it demanded of petitioner.

The final element in petitioner's ethical objection was that he could not abandon his sense of personal responsibility for inflicting injury on his fellowmen, with the self-justification that he was under orders of the State. Here again he was expressing a generally accepted democratic ethic. Thus, the Charter of the Nuremburg Tribunal for the trial of war criminals, of which this country was a leading signator, outlawed the defense of "superior order" for the crimes within the tribunal's jurisdiction. That document asserted the principle that an order of the State does not necessarily free a man from his personal responsibility to evaluate and answer for harm he inflicts on his fellowmen.

As against the primacy of freedom of conscience and its severe infringement by the committee, no substantial, and certainly no compelling, justification can be shown for the committee's order to petitioner to abandon and contra-

vene his conscientious beliefs. His punishment by the instant contempt conviction for adhering to his beliefs thus violates the First Amendment. This Court has generally asserted the essentiality of the First Amendment guarantee of freedom of conscience in the context of a minority belief. Certainly the First Amendment protection is even more significant where, as here, the dictate of conscience reflects generally accepted concepts.

The investigation and the questions petitioner refused to answer were also an unjustifiable invasion of the freedom of expression, press, and association protected by the First Amendment.

ARGUMENT

I. Due process was violated because the pertinency of the questions petitioner refused to answer was unclear, nor was it clarified by the committee upon his objection.

Petitioner clearly raised at the committee hearing the issue of the pertinence of the questions he refused to answer. A primary element in his conclusion that giving the names of past associates was unethical, was his lack of comprehension of their pertinence. At the initial demand by the committee for names—the demand that he expose persons he had known as Communists in 1938—he emphasized in his objection that the committee had not stated "the purpose" of interrogating him or "the pertinence" of his affairs "to any valid legislative inquiry" (Hearings, pp. 1733, 1735). And petitioner made it clear that his objection to all the questions he refused to answer was the same (Hearings, pp. 1740, 1741). Thus, whether or not due process requires a disclosure of pertinence absent a pertinency objection, here it was undoubtedly the committee's duty to clarify pertinence unless it was already indisputably apparent. See *Deutch* v. *United States*, 367

U. S. 456, 467-8; *Barenblatt* v. *United States*, 360 U. S. 109, 124-5; *Watkins* v. *United States*, 354 U. S. 178, 214-15. We shall show that pertinence was neither manifest from the circumstances nor clarified by the committee.

There was no clarification of the subject of investigation, which is the first requisite for clarity of pertinence of the questions (*Ibid.*).

The subpoena summoning petitioner to the committee hearing revealed nothing whatsoever about its subject or purpose.[1] When petitioner appeared, two days after the opening of the investigation, there was no introductory explanation or statement by the committee of purpose, and his interrogation began forthwith with questions as to his employment history (Hearings, p. 1728). While petitioner indicated towards the inception of the interrogation his speculation that the subject of investigation might be the press, committee counsel contradicted this possibility and indicated that the committee was concerned only with petitioner's individual employment and status.[2] The only indication by the chairman of the subject of the investigation also negated any possible supposition that the subject was the press: Petitioners' objection to answering

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[1] The subpoena read: "Pursuant to lawful authority, you are hereby commanded to appear before the Internal Security Subcommittee of the Committee on the Judiciary of the Senate of the United States, on Tuesday * * * at their committee room * * * then and there to testify what you may know relative to the subject matters under consideration by said committee. Hereof fail not" etc. The subpoena is printed on page 2 of the Report of the Committee on the Judiciary to the Senate, 84th Cong., 2d Sess., entitled "Proceeding Against Alden Whitman for Contempt of the Senate", and was copied into the record in the District Court. See p. 46 ff. of trial transcript.

[2] Petitioner suggested that a question as to the number of copy desks at the New York Times related to the operations of the press; counsel replied: "No; it is an inquiry directed to determine your standing and influence in the organization, sir." (Hearings, p. 1730.)

was first voiced to a demand for the names of persons he knew in a Communist unit in 1938, which apparently had no connection with the press (Hearings, pp. 1732-3, 1743). The chairman explained that there may be "a Communist unit that is now active in New York City * * * that is one thing that we are investigating," and that the demand for these names was "the very heart of this inquiry" (Hearings, p. 1737). Certainly, no indication that the subject had any relation to the press.[1]

Remarks by a committee member and counsel indicated that the committee's purpose was to ascertain whether petitioner was associated with or "dedicated to the overthrow of this Government" (Hearings, pp. 1736, 1738).

Other than the foregoing statements, all of which were part of the colloquy arising from petitioner's objection to the demand for the names of persons he knew in 1938, no statement indicating the subject of the investigation was made to him. No explanations were made when petitioner repeated his objection in response to subsequent questions.

Nor did the content of the questions asked of petitioner indicate a subject of investigation. Rather, their range corroborated the impression given by the remarks of a commitee member and of counsel (*supra*, and note 2, p. 8), that the committee was interested in eliciting a biographical account of petitioner because of his past Communist Party membership: to examine his employment, the effect thereon of the investigation, his beliefs, and his membership in various other organizations.

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[1] As to the possibility that the subject of the investigation was the alleged current New York unit, any impression to this effect from the chairman's remark was dispelled by the remainder of the colloquy over this question and the coverage of the other questions addressed to petitioner. The government has never contended that the alleged New York unit was the subject of the investigation; if it had been, none of the unanswered questions had sufficient connection therewith to be pertinent.

In the light of petitioner's objections that he did not comprehend the purpose or pertinence of the questions, the committee would have had a duty of explanation even if the subject of the investigation had been recited in the chairman's statement at the opening of the hearing two days before. But in fact the opening statement was more a disclaimer of an intention to investigate the press than the affirmative enunciation of any subject of investigation (Hearings, pp. 1587-8). And the resolution purportedly authorizing the investigation (set forth in Appendix to Petitioner's Brief)—if petitioner should be assumed to have had notice of it—was so all-inclusive and indefinite that it cannot possibly be regarded as specifying the subject for this investigation. In sum, the committee failed to clarify for petitioner the subject of the investigation, and he therefore necessarily lacked a basis for comprehending the pertinence of the questions addressed to him (See cases cited *supra*, p. 8).

Moreover, as to the particular questions petitioner refused to answer, the Committee did not clearly explain the connection of its demands for names to any subject of investigation it might have had in contemplation. In the colloquy over answering the first demand for names, which related to a 1938 Communist group, committee counsel and a committee member emphasized their interest in petitioner's possible advocacy of violence (Hearings, pp. 1736-1738); this interest certainly was antithetical to any comprehension of any purpose in the demand for the identification of others. It is true that the chairman interjected a statement as to the committee's interest in a current Communist cell in New York. But considering that the chairman seemed unsure as to which group was the subject of the pending question, and in any event made no response to petitioner's query respecting the long lapse of time since its existence, and considering that subsequent remarks during this colloquy continued to emphasize the committee's interest in petitioner's personal views, the chairman's remark did not afford either a definitive or clear explanation of the reason

for the question (Hearings, pp. 1737-9). Nor, certainly, did the chairman's subsequent unembellished statement: "We decide to know whom your associates were in the cell of the Communist Party" (Hearings, p. 1738).

The questions petitioner refused to answer appeared to lack relation to a subject of investigation, but instead to be hit-or-miss, aimed at exposing anyone who ever had any connection with the Communist Party or with a Communist Party member.

In sum, despite petitioner's objection on grounds of pertinency, neither the subject of investigation nor the connection of the questions he refused to answer with any subject, were clearly revealed to him. Accordingly, petitioner's conviction violated the guarantee of due process.

II. The Government cannot establish the pertinency of the questions petitioner refused to answer.

As we have already stated and as petitioner's brief argues in detail, neither the authorizing resolution, the opening or subsequent statements of the committee chairman, members, or counsel, nor petitioner's interrogation, establish the subject of the investigation, nor is it established by any other source. Accordingly, the Government cannot carry its burden of proving a subject of investigation, the first requisite for the element of pertinence. See *Deutch*, *Barenblatt*, and *Watkins*, cited *supra*; and *Wilkinson* v. *United States*, 365 U. S. 399, 408.

Even if there had been a subject of investigation, we submit that the pertinence of the committee's demands for names could not be established.

Neither the majority nor dissenting opinions in this Court in previous cases of refusals to answer name-questions (*Watkins*, *Deutch*), have had occasion to consider the pertinency of name-questions as such, nor did the Court below embark on consideration of this point.[1] The Dis-

trict Court did address itself to this issue, stating that the committee was investigating the Communist Party's "history * * * and * * * its numerical strength at various times" and that knowledge of who were Communists in the previous decades was "pertinent to such investigation" (R. 55).[1] While questions as to the number or function of Communists in various groups could, arguendo, be deemed pertinent if the subject had been that stated by the District Court, we submit that even that subject would not render pertinent the name-questions. The damaging publication of the names of particular individuals could hardly be justified for the sake of a census enumeration.

While pertinency in a congressional investigation has been compared to materiality before a grand jury, the validity of name-questions differs in the two types of investigations because of the different functions of the two bodies. The specific function of a grand jury is to trace and identify criminals, and the names of those involved in the activities under investigation are therefore material. Contrariwise, the justification for the interrogation of a witness by a Congressional Committee is its need for substantive information on specific subjects; it is not authorized to accuse or judge private individuals. Its demand for the names of Communists does not elicit information as to status, function, strength, belief, or any other substantive fact about Communism or any subject under investigation. A name is a means of focusing on a particular individual.

It is true, of course, that the names may give the committee leads to summon other witnesses in other investigations; but we submit that this type of utility to the committee does not render the question pertinent. A pertinent question in a Congressional investigation must be directed to eliciting "facts * * * related to the subjects" under in-

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[1] Pages of the printed Joint Appendix filed in the Court below and supplied to this Court, are designated herein as "R."

vestigation. *Sinclair* v. *United States*, 279 U. S. 263, 299. Name-questions, on the other hand, seem the quintessence of a fishing-expedition—they elicit names which, if traced, might produce witnesses who might have information to contribute in some yet undesignated investigation. "The mere hope of stumbling upon valuable information" is insufficient to establish pertinence. (*United States* v. *Orman*, 207 F. 2d 148, 154-5, C. A. 3, 1953.) Concededly these clues for future field-work by the committee staff may be useful. But it "may often be proper, justifiable, and ultimately helpful in the accomplishment of investigative purposes for a Congressional committee to address to witnesses questions which it cannot demonstrate to be pertinent." (*Bowers* v. *United States*, 202 F. 2d 447, 448 (C. A. D. C., 1953).[1]

In *Barenblatt* v. *United States*, this Court seemed to indicate that the legislative purpose served by identifying a witness as a member of the Communist Party was to supply a basis for then interrogating him about "the various manifestations of the Party's tenets" (360 U. S. at p. 130). When instead he is required to name others, there is an exposure of an individual to obloquy, without more.[2] The name stands alone; the finger points to an individual and the eyes of the public, following the pointing finger, fasten on him. Here indeed the individual is pilloried (Compare *Barenblatt*, 360 U. S. at p. 134). His name is broadcast on the basis of a witness' impressions and perhaps faulty memory, without even the degree of opportunity afforded a witness on the stand to explain the allegations against him.

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[1] And consider discussion in *Watkins*, 354 U. S. at pp. 191-3, of British and American legislative investigations without compulsory process.

[2] In none of this Court's considerations of the argument of exposure by the investigating committees, did it consider the special problem of exposure posed by name-questions. See, *e.g.*, *Watkins*, 354 U. S. at pp. 199-200; *Barenblatt*, 360 U. S. at pp. 132-4.

Indeed this procedure seems unfair under the committees' own standards, since one of their purposes in calling a witness into executive session prior to public hearings is to give him an opportunity to refute allegations before they are publicized (see R. 12-13).

In sum, the name-questions were not directed to eliciting substantive information in the investigation in which they were propounded, and were not therefore pertinent.

III. The order to petitioner to name his past associates in the Communist Party and in other groups, despite his conscientious and ethical beliefs, violated the First and Fifth Amendments.

1. Violation of Freedom of Belief and of Due Process.

In refusing to name his past associates, under the circumstances in which the committee made this demand, petitioner adhered to a conviction that reflected generally accepted ethical or religious tenets and the credo of a democrat.

He was expressing the ethic that a man should not sacrifice other men for his selfish interest: that he should not level accusations against others merely to exculpate himself and unless the public necessity therefor was demonstrated (see Hearings, pp. 1737-8; R. 46-54).[1] The committee failed to demonstrate any connection with the public safety of the damaging accusations it called on petitioner to make (see *supra*, p. 10 and *infra*, p. 16). Nor did it offset the fact that it was ordering petitioner to expose individuals to public embarrassment because they had merely, so far as he knew, exercised the constitutional right of political dissent—in effect he was ordered to expose political heretics

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[1] Compare: "Be not a witness against thy neighbor without cause" (The Bible, *Proverbs*, chapter 24, verse 28); and "He who * * * puts his fellow-man to shame in public * * * has no share in the world to come" (*Ethics of the Fathers*, chapter 3, verse 15).

(Hearings, p. 1738; R. 47-8). The committee's demand for names was thus a demand that petitioner foreswear democratic rights and traditions. In petitioner's word, obedience to the committee order would have forced him "to violate the terms of his own being" (R. 54).

We submit that the committee's order to petitioner to abandon and contravene fundamental moral and democratic concepts was unjustified, and that penalizing him for adherence to his beliefs by the instant contempt sentence violated the First Amendment guarantee of freedom of conscience and belief. This Court has generally had occasion to assert the essentiality under the First Amendment of freedom of conscience, whether based on religious or other tenets, in the context of a minority belief. See *Thomas* v. *Collins*, 325 U. S. 516, 530; *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 634-5; *United States* v. *Ballard*, 322 U. S. 78, 86; *Torcaso* v. *Watkins*, 367 U. S. 488. Certainly the need to "accommodate the demands of the State to the conscience of the individual"[1] is even greater where, as here, the dictate of conscience reflects generally accepted concepts.

A. It is hardly necessary to spell out the point that the committee's order confronted petitioner with an ethical and moral problem. Petitioner undoubtedly would have inflicted injury on his past associates by naming them before the committee: the wide-reaching damage from public embarrassment, hostility, and obloquy. See *Watkins*, 354 U. S. at p. 197; *NAACP* v. *Alabama*, 357 U. S. 449, 462; *Talley* v. *California*, 362 U. S. 60. It is likewise apparent that even aside from the risk of a contempt conviction, it would have been personally advantageous to petitioner, in the eyes of the community, to have cooperated with the committee and won its approval. Clearly, there is a demand of conscience upon an ethical individual to consider in this situation

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[1] *United States* v. *Schwimmer*, 279 U. S. 644, 654-5 (Holmes, J., dissenting).

whether the public interest or only self-interest will be served by his inflicting harm on his fellows.

The call of conscience is the more poignant because he is confronted by a power that does not seem in keeping with our governmental traditions: the committee's assertion of power to force a private individual to make public accusations against another. To be contrasted with the role that the committee attempted to impose on petitioner, is the role of a witness before a grand jury. Testimony before the grand jury is secret; it is weighed by an orderly procedure before any public accusation is issued; the witness does not bear sole responsibility for the accusation; finally the grand jury is investigating wrongs defined by law, so that there is a clear and established public necessity for information against those involved.

In contrast, the order to petitioner was an order not only to give evidence but personally to inflict injury. He was ordered to initiate damaging charges, publicly and with sole responsibility, and to bear the burden of doing irreparable injury though no defined wrong was under investigation. Indeed, petitioner indicated he knew of no one connected with advocacy of overthrow of the government or any subversion and that for this reason as well as the lapse of time since his Communist membership, he did not understand the national interest in the exposure of his past associates (Hearings, pp. 1733-8, 1743-5). The committee nevertheless failed to clarify any justification from the standpoint of the public welfare for the damaging exposures it demanded (Hearings, pp. 1735-43, and ff.).

B. Not only was petitioner's conscientious objection based on the general ethical precept against sacrificing others to selfish interest, but also on democratic faith. He was asked to denounce individuals with whom he had associated to exercise the Constitutional right to political expression and to strive—so far as he knew—by peaceful means for social betterment (Hearings, p. 1738; R. 47-8).

He was thus called upon to repudiate First Amendment freedoms, and indeed to aid in creating the pervasive fear of nonconformist political expression spread by the committee's exposures of political pasts. Compare *Watkins; NAACP, loc. cit. supra; Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Garner* v. *Los Angeles Board*, 341 U. S. 716, 728 (Frankfurter, J., concurring in part).

Denunciation of political heretics—which in effect was the role the committee sought to force on petitioner—has always been abhorrent to believers in democratic rights. See Chafee, *Thirty-Five Years with Freedom of Speech* (1952), 27-28, citing the early example of a refusal to denounce dissenters by Francis Jenkes. Jenkes had admitted before the Council of King Charles II that he had criticized royal policies but when asked to name who advised him, answered: "'To name any particular person (if there were such) would be a mean and unworthy thing, therefore I desire to be excused all further answer to such questions.' Proceedings against Francis Jenkes, 6 Howell's State Trials 1189, 1194 (1676)."

C. Petitioner had three possible choices: he could consider only his own self-interest; he could adhere to his ethical conviction; or he could desert his sense of personal responsibility for the injury he would inflict on his fellowmen, with the self-justification that he was obeying the orders of the State. When his conscience did not allow him the latter escape, he again expressed the ethical concept of a democrat. Thus the Charter of the Nuremburg Tribunal for the trial of war criminals, with this country a leading signator, outlawed the defense of "superior order" with respect to the crimes within the Tribunal's jurisdiction.[1] Albeit in a situation very different from

[1] See Wechsler, *Principles, Politics, and Fundamental Law* (1961) 141; Glueck, Sheldon, *War Criminals* (1944) c. IX: "Orders of a Military Superior"; Report on International Juridical Status of Individuals as "War Criminals" by Intra-American Juridical Committee (Pan American Union, 1945) pp. 10-11. The defendant's reliance on a superior order was, however, to be considered in mitigation of punishment.

that at bar, but nevertheless with relevance to the instant ethical concerns, the Charter asserted the principle that an order of the State does not free a man from his personal responsibility to evaluate and answer for harm which he, by his personal participation, helps inflict on his fellowmen.

D. In sum, the committee's order to petitioner to name names would have forced him to contravene deeply held conscientious beliefs, reflecting widely accepted tenets—tenets which take cognizance of the need to protect the interests of the State but at the same time assert that an order of the State does not of itself dissolve an individual's responsibility for injuring his fellows. As against the essentiality of freedom of conscience (see cases cited *supra*) and its severe infringement by the committee, we urge that no substantial, and certainly no compelling, justification for the committee's order to give names can be shown. Any possible utility in the questions petitioner refused to answer was diluted by circumstances we have already discussed: that the names would only have yielded clues which, if traced in the field, might produce witnesses who might have relevant information. Further there was no reason to think such information would in any event relate to Congress' central concern (see *Barenblatt*, 360 U. S. at p. 128), advocacy of overthrow of the government.

It is true that under the overwhelming threat to the national safety of war, the conscientious objector is not deemed to have a constitutional right to act on his belief; but the fact that even in such a crisis it is traditional in Anglo-Saxon law to respect conscientious scruples, is significant.[1] Here there was no compelling justification for

[1] See *Girouard* v. *United States*, 328 U. S. 61, 66-7.

the Government's infringement of freedom of conscience, and petitioner's punishment for adhering to his beliefs violates the First Amendment guarantee. Compare cases cited *supra*, page 15.

We further submit that the committee's order to petitioner to expose his past associates violated the due process guarantee in that it was an arbitrary exercise of government power over petitioner and an unreasonable interference with his right to privacy. Compare *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 464-5, 467; *Kent* v. *Dulles*, 357 U. S. 116, 125-6.

2. Unreasonable Interference with Freedom of Expression, Press and Association.

The hearings show, and the Government argues, that the committee was searching out and subpoenaing individuals suspected of a Communist past if they were engaged in the opinion media, and in particular the press. The threat of a public charge of Communist association and of public interrogation by the committee—which can be launched even on an unverified and undisclosed rumor—undoubtedly deterred anyone who was in any way susceptible to such a charge from working in the area of the press and public expression. At the same time, the risk of public embarrassment and obloquy also tended to discourage publication of ideas that might arouse a suspicion of pro-Communism; non-conformist political expression in the opinion media became hazardous when the committee asserted a particular interest and power over persons working in that area.[1]

Thus, without outright prohibition but nevertheless effectively, the committee diminished the guarantee of free expression. Its activity detracted from the Constitutional edict that the government may not restrict expression on

[1] Compare *Rumely* v. *United States*, 197 F. 2d 166, 174 (C. A. D. C., 1952), aff'd 345 U. S. 41; *Talley* v. *California*, 362 U. S. 60.

the basis of a person's associations or relations, past or present, but only if his "utterances transcend the bounds of the freedom of speech which the Constitution protects." *De Jonge* v. *Oregon*, 299 U. S. 353, 365. The government cannot "say * * * some persons may, while others may not, disseminate information. * * * " *Schneider* v. *Irvington*, 308 U. S. 147, 164.

Furthermore, the committee, in the questions petitioner refused to answer, demanded the exposure of individuals who were alleged only to have engaged in peaceful expression of dissident opinion and in association for this purpose. Certainly public obloquy as the result of lawful expression and association discourages free and fearless political dissent and would tend "to operate as a real deterrent to people contemplating even innocent associations." See *Garner, loc. cit., supra* page 17.

This discouragement to free association increases when the committee, as in the case at bar, forces the witness to expose not only his own past unpopular associations, but those of others. There is a fresh violation of the privacy of association by exposure of the affiliations of individuals that the committee has not previously publicized.[1] And by forcing a witness to turn on his past acquaintances in an erstwhile lawful organization, all association is discouraged, because " ' each man begins to eye his neighbor as a possible enemy' " (see *Weiman* v. *Updegraff*, 344 U. S. 183, 191, quoting Judge Learned Hand). Through an association that now appears innocent, he may be forced in the future into the position either of the accused or the accuser, both unhappy roles.

To balance against these interferences with freedom of expression, press, and association. the connection with the national security of the entire investigation—let alone the name questions petitioner refused to answer—was shadowy and obscure. In this case it was not true, as this

[1] Compare *Uphaus* v. *Wyman*, 360 U. S. 72, 81.

Court stated in *Barenblatt*, that "the record discloses considerable testimony concerning the foreign domination and revolutionary purposes and efforts of the Communist Party" (360 U. S. at pp. 131-2). Committee counsel indicated there was no information as to espionage or sabotage connections of the witnesses at these hearings which would even lead to questions on these matters (R. 32). Petitioner's own activity and knowledge was limited to peaceful political association and expression; the committee's interference with First Amendment freedoms through the questions he refused to answer could not find justification in the necessity for information on subversion or violence.[1]

It is true that this Court indicated in the *Barenblatt* opinion that Congress has a legitimate concern with "manifestations" of the Communist Party other than advocacy of overthrow of the Government. But the question at bar is whether the interferences of the committee are constitutional when Congress' basic justification for investigating in this area—protecting the government from violence—is as diluted as it was here. Here the committee was requiring the names of persons who might, if traced, be likely at most to have information about past peaceful manifestations of the Party. We submit that the connection of the questions petitioner refused to answer with Congress' concern with overthrow of the government was too speculative and attenuated to justify the committee's thrust into the area of First Amendment rights. If the questions had any pertinence (*supra*, pp. 11-14), their "slim semblance of pertinency" was insufficient to justify the severe interference they worked in First Amendment freedoms. See *Rumely*, 197 F. 2nd at page 171. Compare *Scull* v. *Virginia*, 359 U. S. 344, 352-3.

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[1] Compare *Deutch*, 367 U. S. at p. 470. where the witness' experience and knowledge did not include the subjects purportedly under investigation.

CONCLUSION

It is respectfully submitted that petitioner's conviction should be reversed.

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